In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1279

BENNIE RALPH TIMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1315

MARGARET LORETTA NOLTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals is reported at 432 F. 2d 1011. (Pet. App. A).[1]

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1970, and petitions for rehearing were

[1] The two petitions have identical appendices.

denied on December 29, 1970. The petition in No. 1279 was filed on January 28, 1971. In No. 1315 the petition was not filed until February 5, 1971, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause for the arrest and incidental seizure of marihuana.
2. Whether the trial court properly refused to require disclosure of an informant's identity.
3. Whether petitioners were prejudiced because of the admission of certain statements made by the informant to a customs agent.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioners and two co-defendants were convicted of violating 21 U.S.C. 176a in regard to the illegal importation of marihuana. Each was sentenced to five years' imprisonment. The court of appeals affirmed petitioners' convictions in a *per curiam* opinion (Pet. App. A).

On April 6, 1969, Customs Agent Burnett received information from an informant that a 1969 light green Chevrolet El Camino truck, bearing temporary license plate number 5445, was about to enter the United States from Tijuana, Mexico, and that it contained a large quantity of marihuana (Tr. 10–12, 35,

219–221).[2] The informant also stated that the purchasers of the marihuana would probably accompany this truck into the United States in a 1963 white Chevrolet station wagon, bearing California license number LJF–427 (Tr. 10–12, 35, 219–221; Pet. App. C).[3] Agent Burnett communicated this information to agents Van Diver and Martin. Martin was instructed to maintain surveillance at the port of entry, San Ysidro, California. (Tr. 219–220, 293–297; Pet. App. C).

Martin shortly thereafter observed the Chevrolet station wagon enter the United States followed by the El Camino truck (Tr. 67, 297–298). Each automobile bore the license plate numbers specified by the informant (Tr. 297–298); petitioner Nolte was alone driving the truck (Tr. 299–300). Shortly after crossing the border both cars stopped at a restaurant and two men got out of the station wagon and conversed for a short time with Miss Nolte (Tr. 26, 298, 301). One (co-defendant Hileman) remained with Miss Nolte and thereafter drove the truck (Tr. 301).

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[2] We are lodging with the clerk the three-volume transcript of proceedings.

[3] Pet. App. C is a copy of the affidavit of agent Burnett submitted in opposition to the motion to suppress. That affidavit states that the informant had previously given information in two previous cases regarding marihuana smuggling; that one case had resulted in a federal conviction and the other was still pending; and that the informant had also given information regarding Tijuana marihuana dealing which had been verified by other sources (Pet. App. C). Burnett reaffirmed the truth of his affidavit when he took the stand at the hearing on the motion to suppress (Tr. 11).

Several agents followed the truck to a residence in Santa Ana, California, about 90 miles from the border (Tr. 20–21, 220, 302).[4] Hileman backed the truck inside the garage and petitioner Timmons (who had not been seen in the vehicles crossing the border) shut the garage door (Tr. 354–355). A few minutes later the agents knocked on the door of the residence, identified themselves as federal officers and announced that their purpose was to place the occupants under arrest (Tr. 223). Petitioner Nolte was arrested while sitting at a kitchen table directly in front of an open door leading to the garage (Tr. 223–225, 240); petitioner Timmons was arrested in front of a washer and dryer upon which several bricks of marihuana taken from the truck had been stacked (Tr. 27–28, 224–227, 306). The house and both cars belonged to petitioner Timmons (Tr. 242, 373).

Disclosure of the informant's identity was denied both at the hearing on the motion to suppress and at the trial (Tr. 143, 234–235).

ARGUMENT

1. Petitioners argue that there was insufficient probable cause for their arrest under the standards of *Spinelli* v. *United States*, 393 U.S. 410. There are in this case, however, two crucial factors not present in *Spinelli* which render that decision inapplicable. Customs Agent Burnett explained that he regarded the

[4] The station wagon, driven by co-defendant Clark Timmons, was lost in traffic (Tr. 302) and arrived at the Santa Ana residence after the arrest of the others. When he arrived Clark Timmons was also placed under arrest (Tr. 308, 322–328, 357, 362).

informant as reliable because of the reliable information he had given in the past. Secondly, the information provided by the informant was quite specific as to the vehicles involved, including their description, license numbers, the fact that the truck would be carrying the marihuana and that the purchasers would probably be crossing the border in the car at the same time as the truck. This particularized information was sufficient to support a reasonable conclusion that the informant was reporting more than "casual rumor" based on "general reputation," *Spinelli, supra,* 393 U.S. at 416. This conclusion was strengthened by agent Martin's personal observations at the border.[5] The totality of the circumstances thus provided probable cause to make an arrest. *Draper* v. *United States,* 358 U.S. 307, 313; see *Ker* v. *California,* 374 U.S. 23; *McCray* v. *Illinois,* 386 U.S. 300.[6]

2. *a.* Since probable cause was shown by agent Burnett's testimony as to the informant's reliability and agent Martin's confirmation at the border of what the informant had stated, the trial court properly refused to direct disclosure of the informant's identity at the pre-trial suppression hearing. *McCray* v.

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[5] Petitioners argue that since the government stated that the informant was not a participant (Tr. 89) the information must have been second-hand. The informant could, however, have seen the truck being loaded without being a participant.

[6] Petitioner Nolte suggests (Pet. No. 1315, p. 14) that cross-examination of Customs agent Burnett was unduly limited under *Perry* v. *United States,* 336 F. 2d 748 (C.A.D.C.). The agent was, however, extensively cross-examined as to the informant's statements (Tr. 33–42) and the prior information he had supplied (Tr. 51–54). The agent testified that the informant did not report how he got his information (Tr. 32–33).

Illinois, 386 U.S. 300, 311–312. The decision in *United States* v. *Tucker,* 380 F. 2d 206, 211 (C.A. 2) is not to the contrary since that decision recognized that where, as here, the information given is corroborated, the identity of the informant need not be disclosed.

b. Petitioner Timmons (Pet. 11–13) contends that since he was not an occupant of either of the vehicles, the disclosure of the identity of the informant could have aided his defense at trial because the informant might have testified that he was not one of the purchasers. But there was no suggestion in the government's case that Timmons was a purchaser in Mexico. He was convicted on evidence that he owned the two vehicles and that the marihuana was driven to his home, unloaded in his garage and placed in his house in his presence. Nothing that occurred in Mexico could detract from the reasonableness of the inference that he knew of the illegal importation and participated directly in its illegal concealment.

By the same token, whatever the informant might have seen in Mexico would not conflict with the clear evidence of petitioner Nolte's guilt; she not only drove the truck containing the marihuana across the border but was present in the house when the drugs were unloaded and placed in plain view. The court therefore properly refused to require disclosure of the identity of the informant. *Rugendorf* v. *United States,* 376 U.S. 528.

3. At trial, agent Burnett was permitted to testify over objection as to what the informant had told him prior to the surveillance (Tr. 216–221), and agent Martin was permitted to state what agent Burnett

had told him in that regard (Tr. 294–297).[7] The court of appeals, in reversing the conviction of Clark Timmons, ruled that this was inadmissible hearsay which may well have been the "determining factor in the jury's mind" in finding him guilty (Pet. No. 1279, App. A 19). Assuming *arguendo* the correctness of that ruling,[8] it did not require a like ruling as to petitioners. It should be recalled that Clark Timmons had driven the station wagon (which apparently contained no narcotics) across the border and did not arrive at the house until after the panel truck was unloaded and his co-defendants had been placed under arrest (Tr. 308, 322–328, 357, 362). Petitioners were in an entirely different posture since the marihuana was unloaded and seized in their presence. The court correctly concluded that this other evidence was so "overwhelming" as to render the "error" in the admission of the third party statements harmless as to them.

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[7] In opening argument, government counsel stated that the agents would testify as to the information provided by the informant. After objection, the government stated out of the jury's presence that it intended by this evidence to show only the state of mind of the officers at the time they began the investigation. The court agreed and decided to so instruct the jurors. Although it failed to do so, petitioner failed to object to the lack of that instruction or request it (Tr. 435–453).

[8] The admission of third-party statements to show state of mind does not violate the hearsay rule. See, *e.g.*, *Davis* v. *United States*, 411 F. 2d 1126, 1127–1128 (C.A. 5); *Nash* v. *United States*, 405 F. 2d 1047, 1052–1053 (C.A. 8); *Craft* v. *United States*, 403 F. 2d 360, 363 (C.A. 9); *Busby* v. *United States*, 296 F. 2d 328, 332–333 (C.A. 9), certiorari denied, 369 U.S. 876. And while the trial court did not instruct the jury as to the limited use to be made of these statements, the defense raised no objection to this omission. See Rule 30 F.R.Cr.P.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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